Supreme Court, U.S.
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No._____

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In The

Supreme Court of the United States

October Term, 1997

****

DALE EUGENE CARLSON

Petitioner,

V.

NEBRASKA STATE BANK

Respondent.

****

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

****

PETITION FOR WRIT OF CERTIORARI

****

Dale E. Carlson
41561 Road 771
Gothenburg, NE 69138
308-537-2939

Pro se - Petitioner.

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32 pp

QUESTIONS FOR REVIEW

1. Did the Nebraska Supreme Court error by the order entered: "*Petition for further review overruled* ": when Rule 18, Rules of Practice and Procedure, adopted by the Nebraska Supreme Court states: That "*[u]pon the showing of good cause, a rule may be suspended in a particular instance in order to avoid a manifest injustice.*"?

2. Did the Nebraska Supreme Court Judges and Judges of the Appeals Court error and/or abuse the court's discretion by their orders and affirmation of the Trial Court Judge's *Summary Judgments* and thereupon did said judges supersede state and federal rules of practice and procedure pertaining to the validity of Plaintiff's alleged evidence including Promissory Notes?

3. Did the Judges of the Appeals Court error and/or abuse the court's discretion in their "*MEMORANDUM OPINION AND JUDGMENT ON APPEAL*", wherein the judges purposely avoided answering the appellant's specific issue in regard to Rule37(c) Rules of Discovery (ROD), as specified in issues on appeal, and thus affirms a manifest injustice?

4. Did the Judges of the Appeals Court error, in accepting as fact without requiring proof of any kind; and/or absconding the Appellee's story, attested to in oral arguments, regarding the availability of or proof of legitimacy of alleged "original notes" to be examined as evidence?

5. Did the Judges of the Appeals Court error and/or abuse the court's discretion when the Judges Affirmed the Trial Court Judge's decisions granting "Orders for Summary Judgment" to Appellee?

6. Did the Trial Court Judge error and/or abuse the court's discretion when he accepted, for record, Plaintiff's affidavit, made in bad faith, according to "The Best Evidence Rule", and did Plaintiff, according to the Court Record, refuse to

present, in a hearing or trial, for the purpose of establishing validity or proving the genuineness of Plaintiff's alleged "original notes" and documents?

7. Did the Trial Court Judge error in granting Plaintiff's motions for summary judgment without satisfying the legal provisions set forth in the state and federal Rules of Practice and Procedure and Rules of Civil Procedure to make Plaintiff's "alleged facts" into "facts" according to "The Best Evidence Rule", established in "*Federal Trial Handbook*'"?

8. Did the Trial Court Judge error and/or abuse the court's discretion by requiring the Defendant to amend his *Original Answers* to Plaintiff's *Dscovery* when Defendant's *Original Answers* were answered in, and amended in, "good faith" in light of the fact that Plaintiff had never provided original notes to be examined?

9. Did the Trial Court Judge error and/or abuse his discretion in admitting Plaintiff's evidence as allegedly agreed upon by Rule 36(a) ROD, including alleged photocopies of Promissory Notes, provided by Plaintiff, when said notes had not been agreed upon as bona fide and actual copies of Promissory Notes executed by Defendant, whereas the alleged notes were, in actuality, specifically denied by Defendant on the grounds that copies lack validity?

10. Did the Trial Court Judge error and/or abuse the Court's discretion when the Judge gave no ruling on Rule 37(c) of the ROD when said rule was specifically denied and made issue of by Defendant in *Defendant's Amended Answers* and oral arguments?

11. Did the Trial Court Judge commit an "error in law" in not giving a reason for his disregard of Rule 37(c) of the ROD at any point; or applying Rule 37(c) of the ROD as requested by Defendant to the provision in Rule 36(a) of the ROD regarding "genuineness" of documents which the Plaintiff alleged and thus allowed to enter into the Court Record as prima facie evidence, and evidence being contested

and denied by Defendant, with disregard to provisions specifically set forth in Rule 36(a) of the ROD?

12. Did the Trial Court Judge error and/or abuse the court's discretion when he admitted the *Defendant's Amended Answers*, despite the fact that Defendant amended his answers properly in accordance with Rule 37(c) of the ROD?

13. Did the Trial Court Judge error and/or abuse the court's discretion when he ignored Defendant's specified Rule 37(c) of the ROD to rule by the Judges prejudicial usage of Rule 36(a) of the ROD to the granting of Plaintiff's *Motions for Summary Judgmennt ?*

14. Did the Trial Court Judge, Judges of the Appeals Court and the Nebraska Supreme Court Judges error and/or abuse the court's discretion in hearing and reviewing, respectively, the Trial Court Judge's biased and/or disregarding spirit (as set forth in Question 11,) for a "Fair and Impartial Hearing" of the defense of the Defendant/Appellants Cases?

15. Did the Trial Court Judge error and/or abuse the court's discretion by facilitating the specific "chain of events" established in "STATEMENT" (pg.2) that denied Defendant's "due process of law" to present and cross-examine evidence before an "impartial jury", which could only have happened in a TRIAL setting; as opposed to that of a HEARING, wherein summary judgments were granted; such TRIAL proceedings, being guaranteed by the United States Constitution, Amendment 14, Sec.(1), specifically Defendant's demand for: "*Notice and Demand for Trial by Jury*" as provided for in the U.S. Const., Amend. 7?

16. Did the Trial Court Judge error and/or abuse the court's discretion when the Judge absconded the Plaintiff's lack of bona fide evidence from becoming "material fact" which may have been considered a detriment to the Plaintiff's cases had they been held to the scrutiny of a trial (by bench or jury)?

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Dale Eugene Carlson, Pro se petitioner, respectfully petitions for a writ of certiorari to review the Judgments of the Nebraska Supreme Court and the Nebraska Court Of Appeals Memorandum Opinin And Judgement On Appeal.

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OPINIONS BELOW

The opinions of the Nebraska Supreme Court (App. 10, 11) The opinions of the Nebraska Court of Appeals (App.1, 8, 9) The opinions of the Eleventh Judicial District (App. 12, 13) are reported.

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JURISDICTION

The Nebraska Supreme Court entered its orders on January 28, 1998 (App. 10, 11). The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1254 (1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment of the United States Constitution provides, that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Fourteenth Amendment Section (1) of the United States Constitution provides, in relevant part, that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

In the interest of the equity of the laws and the protections of such laws, pertinent hereto; the entirety of "Chapter 57 *The Best Evidence Rule* of the Federal Trial Handbook", provided in relevant parts, (Sec. 57.2, *"SITUATIONS CALLING FOR THE 'BEST EVIDENCE'")* that: *"Where the contents of a document are in issue, the document itself is the best evidence thereof and it must be produced or its absence must be properly accounted for before any form of secondary evidence may be admitted in evidence ."*

And in relevant part, (Sec. 57.4, *"ADMISSIBILITY OF DUPLICATES"-: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. FRE 1003."*[1]

And as pertinent hereto, *"REVISED RULES OF THE SUPREME COURT / COURT OF APPEALS OF THE STATE OF NEBRASKA"*, as adopted by said Courts, and in reference to rules, *"Rule 18 of Practice and Procedure"*, and *"Rules 36 & 36(a) and Rule 37(c), of the (ROD).*

****

STATEMENT

This case was a Replevin Action in which the Appellant/Petitioner was sued by the Appellee/Respondent for not paying on several promissory notes regarding a specific amount of money borrowed from the Appellee.The Appellee brought this action on the grounds that the Appellant owed them an amount of money. The Petitions are (Appeal No. 96-1097, which is a Petition for Declaratory Judgment) and (Appeal No. 96-1106, which is a Petition in replevin.

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[1]. Annotation:
Federal Rules of Evidence(FRE); Rule 1003.

Both Petitions revolve around the same promissory notes, even though they (the original notes) were not attached in 96-1097.

The Appellant Demurred the Actions (Appeal No. 96-1097), and (Appeal No. 96-1106), both of which was overruled by the Trial Court. The Appellant filed his answers to the Petitions in both cases (Appeal No. 96-1097, on May 20, 1996) and (Appeal No. 96-1106, on April 29th, 1996). After several misc. filings and rulings, the Plaintiff filed Discovery on the Defendant in both cases. The Defendant filed answers to both sets of Discovery (Appeal No. 96-1097, on June 12, 1996) and (Appeal No. 96-1106, on July 3, 1996) The Defendant exercised the right to challenge any and all allegations with respect to the validity of the promissory notes or any activities related to same. The Plaintiff filed a Motion to Deem Answers Admitted (Appeal No. 96-1097) and (Appeal No. 96-1106), on July 15, 1996. At the hearing, held on the 19th day of July, 1996, the Defendant objected to the Plaintiff's motion to Deem the Admissions Admitted. The Court, on the 22nd of July, 1996, issued an order directing the Defendant to submit amended answers to the Plaintiff's discovery within 20 days. (Appeal No. 96-1097), and (Appeal No. 96-1106).

On August 7, 1996, the Defendant submitted Amended Answers to the Plaintiff's discovery. (Appeal No. 96-1097), and (Appeal No. 96-1106). The Plaintiff filed their second Motion to Deem Answers Admitted (Appeal No. 96-1097), and (Appeal No. 96-1106), on August 22, 1996. On September 18, 1996, the Court issued an Order (Appeal No. 96-1097), and (Appeal No. 96-1106), where the Court deemed all admissions admitted.

On October 1, 1996, the Plaintiff filed their Motions for Summary Judgment. (Appeal No. 96-1097), and (Appeal No. 96-1106), The Defendant responded with his Objection to Motion for Summary Judgment in both cases (Appeal No 96-1097), and (Appeal No. 96-1106). On October 18th, 1996, the Trial Court issued Summary Judgment against the Defendant in both cases (Appeal No. 96-1097), and (Appeal No. 96-1106).

The Appellant herein Appealed the Trial Court's decision

of October 15th, 1996, in which the Court granted Summary Judgment against the Defendant in both cases, in favor of the Plaintiff (Appeal No. 96-1097) and (Appeal No. 96-1106).

The Appellant filed his Notice of Appeal from the Trial Court's decision filed October 18, 1996, to the Nebraska Court of Appeals, on October 22, 1996, (Appeal No. 96-1097) and (Appeal No. 96-1106).

Appellant filed a Motion to Join (Appeal No. 96-1097) and (Appeal No. 96-1106), on November 8, 1996 in the Court of Appeals. and was noticed on November 27, 1996 that the Motion was sustained by the Court of Appeals.

On December 28,1996 Appellant moved the Court to grant a 30 day enlargement of Brief date from January 10, 1997 to February 10, 1997, and on January 21, 1997 noticed the Appellant that the Court had sustained his Motion to enlarge the Brief date by 30 days until February 10, 1997. Notice of Appeals Court that Appellants Consolidated Brief was received February 12, 1997.

Appellee filed for and received an extension on his brief date and court received Brief Of Appellees as required by date set by Court and Brief Of Appellees were so filed by Brief date set.

Notice by Court that Oral arguments were set for November 18, 1997 at 1:00 P.M. Kearney, NE.

Argument at Appeals Hearings were made as: *Appellant's opening remarks:*

"*Good afternoon your Honors,*

In the appeals before you, my brief clearly shows that "plain and simple" error occurred in the proceedings of the trial court in delivering summary judgments in favor of the Appellee.

The error is in the process, and possibly the spirit of the trial court's actions, as indicated in the Prepositions of Law, the Statement of the Case found in the 'Appellant's Consolidated Brief'. The specifics of these erroneous actions are laid out in subsequent sections of the brief. I thank you for your time and request to reserve the balance of my time for any questions that you may have, or for rebuttal to any Appellee's remarks."

Appellee's remarks consisted of recital of his brief,

during which an Appeals Court Judge asked Appellee, "[i]f the notes were ever made available to Appellant," and appellee stated that, "[t]hey had (been made available), but judge never asked him if they had been presented for inspection or contestment to enable them to be held to a fair level of scrutiny tantamount to a cross-examination of evidence process as law and or rules of evidence/procedure provide for when Appellant specifically requested and/or made issue of in appeal. When judge asked if I had any other remarks, I asked if they (the judges of the Appeals Court) could find any proof of notes or Genuineness of documents anywhere that the Appellee had in fact established as such in these Cases on Appeal, Their only remarks were: "Is there anything else Mr. Carlson ?"

On December 10,1997, Appeals Court Judges Affirmed:

Court of Appeals	No. A-96-1097, A-96-1106
Trial Tribunal	No. 22710, 22685
Date Opinion Filed	December 10, 1997
Date Opinion Certified	December 10, 1997

The Appeals Court Judge's "MEMORANDUM OPINION AND JUDGMENT ON APPEAL" refused to mention, rule 37(c) of the ROD but AFFIRMED the Trial Court Judge's unlawful usage of Rule 36(a) of the ROD, and basically went into a recital of law explaining every thing they could think of, all about Replevin and Replevin being proper in these Appeals, I do not recall asking those questions in " Issues On Appeal" but it was very plain that Specific " Issues On Appeal" were not going to be discussed in this Appeals Court Ruling.

Appellant filed December 19, 1997 a PETITION FOR REHEARING and CONSOLIDATED BRIEF IN SUPPORT OF PETITION FOR REHEARING in THE NEBRASKA SUPREME COURT, explaining proceedings of the Cases :

CONSOLIDATED BRIEF IN SUPPORT OF PETITION FOR REHEARING

COMES NOW the Appellant, Dale E. Carlson, with his

memorandum, in Support of his Petition for Rehearing (pursuant to Rule 2(F) of the Supreme Court of Nebraska Rules) regarding the Order of this Court, in which the Court affirmed the District Court's decision.

The Appellant shall be brief in this matter, to-wit: The Court affirmed the decision of the District Court, basically stating that a replevin action was proper in this case. Nowhere did the Appellant state that the action was inappropriate for this matter. The Appellant has no idea where that question arose from, as it was not an issue before the Court of Appeals. The issues were as follows:

ASSIGNMENTS OF ERROR

1. DID THE TRIAL COURT ERROR BY DEEMING THE DEFENDANT'S ADMISSIONS ADMITTED?

2. DID THE TRIAL COURT ERROR IN GRANTING SUMMARY JUDGMENT TO THE PLAINTIFF BASED ENTIRELY ON THE COURT'S ADMITTING THE DEFENDANT'S ADMISSIONS, WHICH EFFECTIVELY TERMINATED THE DEFENDANT'S DEFENSE TO ACTION?

3. DID THE TRIAL COURT ABUSE ITS DISCRETION IN THIS CASE?

Do any of these issues on appeal question the appropriateness of the replevin action?

Regarding the Court's decision regarding the Trial Court: The issues of this appeal were straight forward and prima facie, to-wit: The Appellant responded to the Court order of the 22nd of July, 1996, directing the Defendant to submit amended answers to the Plaintiffs Discovery within 20 days. (Appeal No. 96-1097) and (Appeal No. 96-1106).

The Defendant shows that the Court is exceeding its discretion if it deems all the admissions admitted, on the grounds that Rules of Discovery specifically Rule 37(c), which establishes the remedy if the party fails to admit to something that the opposing party can, and does, prove to be true.

RULE 37(c):

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he or she may apply to the court for an order requiring the other party to pay him or her the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

Nowhere in the Rules does it state that the Court can deem denied admissions admitted, unless, of course, the party fails to answer at all. This is not the case. The Defendant denied the admissions with the express purpose, and right, to force the Plaintiff to prove his case. For the Court to modify, or materially change, the answers, as submitted, to the benefit of the Plaintiff, constitutes a denial of due process.

Furthermore, the Plaintiff was intentionally making this matter more time consuming by not providing the Defendant the opportunity to examine the original documents, which would eliminate this problem immediately. Due to the proceeding, as taken by the Plaintiff, the Defendant could only conclude that the Plaintiff did not possess the original documents, which would have a fatal effect on their entire case.

On the grounds that the Defendant was functioning within the Rules, as established by the Supreme Court, the Defendant did submit the answers to Plaintiff's discovery.

To the Defendants surprise, on September 18, 1996, the Court issued an Order (Appeal No. 96-1097) and (Appeal No. 96-1106) where the Court deemed all admissions admitted. The Defendant was attempting to make the Plaintiff prove their allegations and was placing the burden of proof on the Plaintiff.

> The burden of proof is on the plaintiff, Alliance Loan & Investment Co. v. Morgan, 154 Neb. 745, 49 N.W.2d 593 (1951), and the facts showing entitlement must be shown to have existed at the time the action was commenced.

The most important portion of Alliance Loan & Investment Co. v. Morgan (above) is "the facts showing entitlement must be shown to have existed". If this Court will examine the entire case, it will see that there is ***NOT ONE FACT ESTABLISHED by the Plaintiff.*** The Plaintiff even **admits** that fact in the hearing, held on the 19th day of July, 1996, regarding the Plaintiffs Motion to Deem the Admissions Admitted, the Plaintiffs attorney stated:

> **"At this time I'm not required to have admissible evidence to prove what I've alleged in the petition, and it is alleged properly."**

This statement, from Plaintiff's counsel, can only indicate that the Plaintiff **HAS NOT PROVEN ANY FACTS**, as **he says** he is "not required to have admissible evidence to prove what I've alleged...". At what point is he required to submit "admissible" evidence? This statement was made during the Hearing in which the Plaintiff wanted the Court to deem the Admissions admitted.

The Defendant answered all of the Plaintiff's allegations with a specific denial in this case. For good cause, each photocopy was denied.

Another key fact to be considered herein is that the Plaintiffs "allegations" were nothing more than just that, allegations! **Blacks Law Dictionary 4th Ed.** defines an allegation as:

> "The assertion, declaration, or statement of a party to an action, made in a pleading, setting out what he **expects** to prove." Mathews v. Underpinning & Foundation Co., 17 N.J. Misc. 79, 4 A. 2d 788 789.

As the Plaintiff's counsel stated above, **he had not submitted any admissible evidence**, he was relying on his "allegations" as plead.

Based on the **FACTS**, the Trial Court committed plain and simple error, and the Order (Appeal No. 96-1097,) and (Appeal No. 96-1106) should be vacated and remanded back to the Trial Court with instructions to grant the Appellant summary judgment.

But on January 28, 1998 The Nebraska Supreme Court And Court Of Appeals returned this order entered: Petition for further review overruled.

Therefore Petitioner requests this "PETITION FOR WRIT OF CERTIORARI" be granted and herewith requests the judgment of THE SUPREME COURT OF THE UNITED STATES.

****

REASONS FOR GRANTING THE PETITION

The manifest injustice made real in this Petitioner's STATEMENT clearly exposes the frivolous nature displayed by the Respondent's allegations and unlawful choices made by the Judge's orders and affirmation of orders, and overrulings sustaining error, and/or abuse of the court's discretion of Petitioner's cases presented.

This "PETITION FOR WRIT OF CERTIORARI" should be granted, to prevent these Constitutional violations of the Petitioner's rights.

****

CONCLUSION

There is no doubt that the Trial Court clearly erred and that the Trial Court clearly abused its discretion, and as such, the Order (Appeal No. 96-1097) and (Appeal No. 96-1106) should be vacated and remanded back to the Trial Court with instructions to grant the Petitioner summary judgment .

Respectfully submitted,

Dale Eugene Carlson
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Pro se - Petitioner.

April, 1998

App. 1

IN THE NEBRASKA COURT OF APPEALS

Nebraska State Bank,

Appellee,

v.

Dale Eugene Carlson,

Appellant.

Nos. A-96-1097
and A-96-1106

MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL

Date filed: December 10, 1997
Sievers, Mues, and Inbody, Judges.
Inbody, Judge.

Dale Eugene Carlson appeals from an order of summary judgment in these two combined actions, one seeking replevin and one seeking declaratory judgment. For the reasons set forth herein, we affirm.

I. STATEMENT OF FACTS

Carlson borrowed funds from the Nebraska State Bank (Bank) in 1995 and 1996, using as collateral a security interest in all his machinery, equipment and livestock. Carlson later defaulted, and on March 4, 1996, the Bank demanded payment. On March 12 and 26, Carlson sold 225 head of cattle, which were subject to the Bank's lien, through the North Platte Livestock Auction Company (Auction Company). The Bank had not waived its security interest, and Carlson did not have the Bank's consent to make the sale. Two checks for the proceeds of the cattle sale were made out payable to Carlson and the Bank. Carlson returned the checks, uncashed and unendorsed, to the Auction Company and asked that the Auction Company hold them.

Bank brought a replevin action against Carlson and a declaratory judgment action to determine whether it or the Auction Company had superior right to the proceeds of the cattle sales. Carlson proceeded pro se. On April 12, 1996, the Dawson County District Court, after a hearing Carlson

did not attend, entered an order of replevin, directing that possession of all Carlson's property be delivered to the Bank.

The Bank served Requests for Admissions upon Carlson, and Carlson, still pro se, timely responded. The Bank moved to have the Requests deemed admitted on grounds that Carlson's responses were incomplete or evasive. Following a hearing, the trial court found some answers incomplete and the remainder evasive. The trial court ordered Carlson to submit appropriate amended responses within twenty days or to have the matters covered by the Requests deemed admitted. Carlson resubmitted his original responses, and, after a renewed motion by the Bank, the trial court ordered that the matters covered by Requests for Admissions be deemed admitted.

The Bank moved for summary judgment in its replevin and declaratory judgment actions, both predicated in large part upon the content of those Requests for Admissions. The trial court granted summary judgment in both cases. Carlson now appeals.

II. ASSIGNMENTS OF ERROR

Carlson sets out two assignments of error: (1) The trial court erred in deeming admitted those matters subject to Requests for Admissions propounded by the Bank, where Carlson had responded to those Requests with answers the trial court deemed incomplete or evasive, and (2) the trial court erred in granting summary judgment.

III. STANDARD OF REVIEW

Parties to litigation have the right to present and defend their own interests without the assistance of an attorney, but when they do so their rights are subject to and will receive the same consideration as if they had been represented by an attorney. *Martin v. Martin,* 188 Neb. 393, 197 N.W.2d 388 (1972); *Vielehr v. Malone,* 158 Neb. 436, 63 N.W.2d 497 (1954).

Discovery procedures are committed to the trial court's decision, subject to the mandatory provisions of the Neb. Ct. R. of Discovery and the appropriate statutes. *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986). Whether to deem Requests for Admissions to be admitted

is committed to the trial court's discretion. *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993).

In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence. *O'Connor v. Kaufman*, 250 Neb. 414, 550 N.W.2d 902 (1996).

Replevin is a law action wherein, where tried without a jury, the findings and disposition by the trial court will not be disturbed unless clearly wrong. *Allemang v. Kearney Farm Ctr.*, 251 Neb. 68, 5545 N.W. 2d 785 (1996).

When a declaratory judgment action presents questions of law, an appellate court reaches its conclusion independent of the conclusion reached by the court below, but determinations of factual issues will not be disturbed unless clearly wrong. *Columbia National Ins. v. Pacesetter Homes, Inc.*, 248 Neb. 1, 532 N.W. 2d 1 (1995).

IV. ANALYSIS

1. MATTERS DEEMED ADMITTED

Carlson first argues that the trial court erred when it deemed admitted those matters subject tot he Bank's Requests for Admissions, on grounds that his responses were incomplete or evasive. Such a determination is committed to the trial court's discretion. *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993). Judicial abuse of discretion is found only where the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996).

Neb. Ct. R. of Discovery 36 (rev. 1996) requires that any denial of Request for Admission "shall fairly meet the substance of the requested admission." The rule "requires good faith answers as to the facts, not equivocations which defeat the very purpose of the legislation." *Kissinger v. School District No. 49*, 163 Neb. 33, 40, 77 N.W.2d 767, 771 (1956).

In his brief, Carlson sets forth one reason for standing upon his original responses despite the trial court's order and

the risk of having the Requests deemed admitted: "The Defendant [Carlson] denied the admissions with the express purpose, and right, to force the [Bank] to prove his [sic] case." (Emphasis supplied.)

Neb. Ct. R. of Discovery 36 (a) provides that a "party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to that request." Any doubt as to whether this Rule means what it says was long ago settled in *Kissinger:*

> Counsel for the defendant in the instant case has the impression that he cannot be compelled to answer and thereby assist in making the plaintiff's case. The purpose is a different one altogether. It is not proper to refuse to respond to a requested admission on the ground that the requesting party has the burden of proving the matters contained in the request. A party must respond to a requested admission even though the matters requested may be controverted by the pleadings. A bad response is treated as no response at all and hence as an admission.

163 Neb. at 39, 77 N.W.2d at 771. Carlson may not refuse to respond in order to "force the [Bank] to prove [its] case."

Carlson further contends he need not respond to those Requests pertaining to documents because he was served with copies rather than with the original documents. This argument is equally without merit. Neb. Ct. R. of Discovery 36 (a) provides that "[c]opies of documents shall be served with the request unless they have been or are otherwise available for inspection and copying." The Bank complied with the Rule, and Carlson is compelled to do likewise.

Finally, Carlson contends that Rule 36 does not provide the trial court with authority to deem Requests admitted if it finds them to be incomplete or evasive. Once again, the Rule states otherwise: "If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served." Cf. *Arcadia State Bank v. Nelson,* 222 Neb. 704, 708, 386 N. W. 2d 451, 455 (1986) (trial court "should

have sustained" motion to deem Requests admitted where responses were "at best, evasive and inconclusive"). In this case the trial court offered Carlson an opportunity to amend before deeming the matters admitted, an offer he declined.

In sum, we find no abuse of discretion by the trial court and reject any argument that the court erred in deeming admitted those matters contained within the Bank's Request for Admissions.

2. GRANT OF SUMMARY JUDGMENT

Carlson asserts that the trial court erred in granting summary judgment. We disagree. We note that matters deemed admitted pursuant to Neb. Ct. R. of Discovery 36 are a proper predicate for summary judgment. *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993); *Wibbels v. Unick*, 229 Neb. 184, 426 N.W.2d 244 (1988). Each requisite element for the Bank's causes of action were established when the Bank's Requests for Admissions were deemed admitted.

(a) Replevin Action

The only issue in a replevin action is the right to immediate possession of the subject property at the time of the commencement of the action. *Barelman v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992); *Arcadia State Bank v. Nelson*, 222 Neb. 704, 386 N.W.2d 451 (1986). The Bank's right to immediate possession was established by those Requests for Admissions which were deemed admitted. Specifically, the matters deemed admitted in this case establish: (1) Carlson had executed promissory notes payable to the Bank; (2) Carlson had collateralized those notes with his machinery, equipment, and livestock, giving the Bank a first priority; and (3) he had defaulted.

Carlson asserts that an issue of fact remains as to whether the value of the items replevined exceeds the amount he owes. We disagree. A material issue of fact, for summary judgment purposes, is one that might affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Given the extremely narrow nature of a replevin action, the issue of money received is not material. "As a general rule, since the main issue in a replevin action is

one of title and right to possession, all matters foreign thereto must be excluded from consideration and are not available for defenses." *Arcadia State Bank*, 222 Neb. at 711, 386 N.W.2d at 457. Summary judgment was accordingly appropriate in the replevin action.

(b) Declaratory Judgment

The Bank's right to a declaratory judgment that it had the superior right to the proceeds from the sale of cattle held by the Auction Company were also established by those Requests for Admissions which were deemed admitted. Specifically, those Requests established that (1) Carlson had collateralized loans with his cattle, giving the Bank a first priority; (2) the cattle were sold; (3) the Bank had not waived its security interest.

Having reviewed the evidence in the light most favorable to Carlson, and having granted him all appropriate inferences, we find no error in the granting of summary judgment.

V. CONCLUSION

For the reasons set forth above, we affirm, in both cases, the trial court's entry of summary judgment in favor of Nebraska State Bank.

AFFIRMED.

THE STATE OF NEBRASKA, ss.

I hereby certify that I have compared the foregoing copy of an opinion filed by this Court with the original on file in my office and that the same is a correct copy of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of this Court, in the City of Lincoln.

/s/ Lanet S. Asmussen
Clerk/Deputy Clerk

COURT OF APPEALS NO.	A-96-1097, A-96-1106
TRIAL TRIBUNAL NO.	22710, 22685
DATE OPINION FILED	December 10, 1997
DATE OPINION CERTIFIED	December 10, 1997

App. 8

NEBRASKA SUPREME COURT
AND NEBRASKA SUPREME COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731

December 10, 1997

Dale Eugene Carlson
41561 Road 771
Gothenburg, NE 69138

IN CASE OF: A-96-1097, Nebraska State Bank v. Carlson

Submission to Court filed 11/18/97 has been reviewed by the court and the following order entered: Affirmed. Inbody, Judge. See memorandum opinion.

Respectfully,

CLERK OF THE SUPREME
COURT AND COURT OF APPEALS

App. 9

NEBRASKA SUPREME COURT
AND NEBRASKA SUPREME COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731

December 10, 1997

Dale Eugene Carlson
41561 Road 771
Gothenburg, NE 69138

IN CASE OF: A-96-1106, Nebraska State Bank v. Carlson

Submission to Court filed 11/18/97 has been reviewed by the court and the following order entered: Affirmed. Inbody, Judge. See memorandum opinion.

Respectfully,

CLERK OF THE SUPREME
COURT AND COURT OF APPEALS

App. 10

NEBRASKA SUPREME COURT
AND NEBRASKA SUPREME COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731

January 28, 1998

Dale Eugene Carlson
41561 Road 771
Gothenburg, NE 69138

IN CASE OF: A-96-1097, Nebraska State Bank v. Carlson

Pet Applt Further Review (96-1097/1106) filed 12/19/97 has been reviewed by the court and the following order entered: Petition for further review overruled.

Respectfully,

CLERK OF THE SUPREME
COURT AND COURT OF APPEALS

App. 11

NEBRASKA SUPREME COURT
AND NEBRASKA SUPREME COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731

January 28, 1998

Dale Eugene Carlson
41561 Road 771
Gothenburg, NE 69138

IN CASE OF: A-96-1106, Nebraska State Bank v. Carlson

Pet Applt Further Review (97-1097/1106) filed 12/19/97 has been reviewed by the court and the following order entered: Petition for further review overruled.

Respectfully,

CLERK OF THE SUPREME
COURT AND COURT OF APPEALS

IN THE DISTRICT COURT OF DAWSON COUNTY, NEBRASKA

NEBRASKA STATE BANK, A NEBRASKA BANKING CORPORATION

PLAINTIFF,

CASE NO. 22685

v. ORDER

DALE EUGENE CARLSON,

DEFENDANT,

This matter comes before the Court on October 11, 1996, on the "Motion for Summary Judgment filed by the Plaintiff. The Plaintiff is represented by Kelly L. Sudbeck. The Defendant appears, pro se. Evidence is adduced. The matter is argued, submitted, and taken under advisement.

This matter comes before the Court on October 15, 1996, after having been taken under advisement. The Court finds that there are no material issues of fact to be presented to the trier of fact and that the Plaintiff is entitled to the entry of a summary judgment.

Therefore, the Court finds the Summary Judgment should be entered for the Plaintiff and against the Defendant and that all replevied items be declared to be the property of the Plaintiff. The Court finds that after the payment of the indebtedness and the costs of this action, that any proceeds from sale of the property replevied, combined with the monies in Case Number 22710, be paid over to the Defendant,

SO ORDERED

BY THE COURT
/s/ John P. Murphy
John P. Murphy
District Judge

IN THE DISTRICT COURT OF DAWSON COUNTY, NEBRASKA

NEBRASKA STATE BANK, A NEBRASKA BANKING CORPORATION

PLAINTIFF,

v.

CASE NO. 22710
ORDER

DALE EUGENE CARLSON,

DEFENDANT,

This matter comes before the Court on October 11, 1996, on the "Motion for Summary Judgment filed by the Plaintiff. The Plaintiff is represented by Kelly L. Sudbeck. The Defendant appears, pro se. Evidence is adduced. The matter is argued, submitted, and taken under advisement.

This matter comes before the Court on October 15, 1996, after having been taken under advisement. The Court finds that there are no material issues of fact to be presented to the trier of fact and that the Plaintiff is entitled to the entry of a summary judgment.

Therefore, the Court finds the Summary Judgment should be entered for the Plaintiff and against the Defendant and that all replevied items be declared to be the property of the Plaintiff. The Court finds that after the payment of the indebtedness and the costs of this action, that any proceeds from sale of the property replevied, combined with the monies in Case Number 22685, be paid over to the Defendant,

SO ORDERED

BY THE COURT
/s/ John P. Murphy
John P. Murphy
District Judge

IN THE DISTRICT COURT OF DAWSON COUNTY, NEBRASKA

NEBRASKA STATE BANK,

PLAINTIFF,

v.

CASE NO. 22710
ORDER

DALE EUGENE CARLSON,

DEFENDANT,

NOTICE OF DEMAND FOR TRIAL BY JURY

TO ALL PARTIES TO THIS ACTION:

The Defendant, Dale Carlson, asks that the above referenced case be heard by a jury of 12, pursuant to the Statutes of the State of Nebraska.

Dated this 24th day of April, 1996.

/s/ Dale E. Carlson
Dale E. Carlson
41562 Road 771
Gothenburg, NE 69138

IN THE DISTRICT COURT OF DAWSON COUNTY, NEBRASKA

NEBRASKA STATE BANK,

PLAINTIFF,

v.

CASE NO. 22685
ORDER

DALE EUGENE CARLSON,

DEFENDANT,

NOTICE OF DEMAND FOR TRIAL BY JURY

TO ALL PARTIES TO THIS ACTION:

The Defendant, Dale Carlson, asks that the above referenced case be heard by a jury of 12, pursuant to the Statutes of the State of Nebraska.

Dated this 24th day of April, 1996.

/s/ Dale E. Carlson
Dale E. Carlson
41561 Road 771
Gothenburg, NE 69138